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Issue Date: 08 September 2004

Case No. 2004-WPC-1

JESSIE DALLAS SNIDER
Complainant

v.

CITY OF SALEM
Respondent

APPEARANCES:
Richard R. Renner, Esq.
Dover, OH
For Complainant

Michael D. Kohn, Esq.
Washington, D.C.
For Complainant

Robert J. Krehbiel, Esq.
St. Louis, MO
For Respondent

ORDER DENYING MOTION FOR SUMMARY DECISION

On August 20, 2004, Respondent, City of Salem, filed a motion for summary decision premised upon Complainant's failure to exhaust administrative remedies by allegedly failing to cooperate in the investigation of his original complaint by the Occupational Safety and Health Administration (OSHA). Respondent proposed that there was no genuine issue of material fact in this regard, and that the related OSHA file supported this position. (In this regard, on August 17, 2004 Respondent also filed an authenticated copy of the U.S. Department of Labor OSHA Case File No. 7-7080-03-026, in the matter of the OSHA investigation.)

Section 18.40 of 29 C.F.R. governs motions for summary decision by the Administrative Law Judge, and is patterned on Rule 56 of the Federal Rules of Civil Procedure. Under § 18.40 (d), if the moving party shows by "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed … that there is no genuine issue as to any material fact and that the party is entitled to summary decision", the Administrative Law Judge may enter summary decision.

On December 17, 2003 the OSHA Regional Supervisory Investigator, Felix A. Bogenshutz, issued a determination that the complaint of discrimination was investigated and "found to have no merit." He attached as the "original complaint" a document captioned "Supplemental Complaint of Retaliation Against Whistleblower Under 29 CFR Part 24" which was signed by Jesse Dallas Snider on June 20, 2003, and a document dated December 15, 2003 which stated that the "case was to be closed for failure of the Complainant to cooperate in the investigation." The file reveals that the initial complaint was signed by Complainant on May 20, 2003, transmitted by facsimile and received by the Department of Labor (DOL) on May 20, 2003. In this he merely alleged a violation of 29 C.F.R. Part 24 by virtue of his having been fired from his employment by Gary Brown, Mayor and Director of Public Works for the City of Salem, for "raising environmental concerns."

The supplemental complaint clarified the statutes alleged to have been violated by Complainant's termination as listed in 29 C.F.R. § 24.1 as follows: the Water Pollution Prevention and Control Act (WPC or CWA), 33 U.S.C. Section 1367; the Safe Drinking Water Act, (SDWA) or Public Health Service Act (PHSA), 42 U.S.C. Section 300j-9; the Toxic Substances Control Act (TSCA), 15 U.S.C. Section 2622; the Solid Waste Disposal Act (SWDA), 42 U.S.C. Section 6971; the Clean Air Act (CAA), 42 U.S.C. Section 7622 (a); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9610, and the Energy Reorganization Act (ERA), 42 U.S.C. Section 5851.

A review of the December 15, 2003 determination of the investigator for the sole purpose of determining whether there is a genuine issue of material fact concerning the question of whether Complainant had cooperated in the investigation of the complaint reveals that the investigator concluded:

> The review has also revealed that you and your designated representative have consistently refused to cooperate with the investigator, and provide the requested information.

Section 24.3(a) of 29 C.F.R. requires that a Complainant file a complaint if he or she believes that any of the statutes to which the provision is related, have been violated Section 24.3(c) states that:

> No particular form of the complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are perceived to constitute a violation.

Section 24.4(b) of 29 C.F.R. directs the Assistant Secretary of Labor to "investigate and gather data concerning the case" with authority to "enter and inspect such places and records" and "questions persons being proceeded against and other employees of the charged employer" and to require the production of "evidence … necessary to determine whether a violation of the law has been committed." Under Section 24.4 (d)(1), the regulation requires that the notice contain a "statement of reasons for the findings and conclusions" and an order to abate the alleged violation if determined that the violation has occurred. Subsection (d)(2) requires that if

a party desires review of the determination, that the request for hearing must be made to the Chief Administrative Law Judge within five business days of the receipt of the determination.

Subsection 24.4 (d)(2) also states that once timely filed, "the determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed." This has been interpreted by the Secretary of Labor and the Administrative Review Board (ARB) to mean that once the investigator's determination has been appealed to the Chief Administrative Law Judge, that the hearing by the appointed Administrative Law Judge is a hearing *de novo* and that the determination by the Assistant Secretary carries no weight before the Administrative Law Judge or the Administrative Review Board. See, *e.g.,* ***Varnadore v. Oak Ridge National Laboratory***, 94-CAA-2, 94-CAA-3 (ALJ Apr. 6, 1994). Also, in ***Billings v. Tennessee Valley Authority***, 91-ERA-12 (ARB June 26, 1996), the complainant sought a remand from the Administrative Review Board to the Wage and Hour Division for further investigation. The Board affirmed the Judge's ruling, stating that Wage-Hour's findings were not binding because the regulations accord complainants a right to *de novo* hearings on the merits of complaints. The Board also wrote: "Accordingly, any arguable flaws in Wage-Hour's investigation or findings would not adversely affect litigation of his case before the ALJ." Slip op. at 8-9 (citations and footnote omitted). See also, ***Jones v. Pacific Gas & Electric Co.***, 97-ERA-3 (ALJ Mar. 19, 1997) (order denying motion for remand to complete investigation).

In addition, I agree with the Complainant that the Tenth Circuit decision cited by the Respondent in *Tod N. Rockefeller v. Spencer Abraham, Sec'y, United States Department of Energy,*58 Fed. Appx. 425, 2003 WL 254879 (10th Cir. Feb. 3, 2003) is not applicable to the present case. It involves an attempt to add an additional cause of action to a discrimination case premised on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. involving three whistle-blower statutes concerning which no original complaint had been filed by the plaintiff-appellant under 29 C.F.R .Part 24 involving the TSCA, SDWA, and CERCLA. The present matter does not involve the failure to file a complaint. Indeed, the Complainant, here, filed both an initial and a supplemental complaint when he was informed that the first complaint was insufficient. None of the other rulings in the determination of the investigation by either the investigator or the Assistant Secretary are of concern here, as they are "inoperative".

Furthermore, the cases involving the United States Equal Employment Opportunity Commission (EEOC) cited by the Respondent bear no relationship to the OSHA investigation at issue in the present matter. As Respondent correctly notes, there is a specific regulation governing EEOC investigations that permits an EEOC complaint to be dismissed for failure to cooperate in the investigation. 29 C.F.R. § 1601.18(b). No such provision appears in 29 C.F.R. Part 24 or the related statutes. No valid reason has been proposed by the Respondent in the present matter for me to do so.

More importantly, in the event that it is determined that the "shall be inoperative" provision of § 24.4(d)(2) is found to be "operative" on procedural issues, Respondent proposes that there is no genuine issue of material fact concerning the issue of whether Complainant has refused to participate in the investigation beyond the filing of the complaint. Complainant answered Respondent's motion on August 25, 2004 with a memorandum in opposition and two sworn factual statements in support thereof. The affidavits confirm that the investigator

contacted him and wanted additional information; that the Complainant told him that while he did not know what else he wanted for the investigation, Complainant offered to meet the investigator with his attorney; that the investigator either would not, or did not agree to set a date to meet with him and his attorney, and that instead, the Regional Administrator issued a final determination with the statement that the "case was to be closed for failure of the Complainant to cooperate in the investigation."

The Complainant and his attorney assert by affidavit that they offered to meet with the investigator on two occasions, but were refused. The investigator's final investigation report of other contacts with the Complainant both before and after the supplemental complaint was filed, makes no mention of Complainant's offer.

Nothing in the Regulations or the governing statutes have been cited as authority for limiting the investigation to meeting with the Complainant without his attorney. However, the verification of Complainant and his attorney that they attempted to meet with the investigator for questioning presents a genuine issue of material fact concerning whether Complainant refused to participate or cooperate in the investigation, thus contradicting the assertion that he failed to exhaust his administrative remedies as a matter of fact. (This assumes that he had a legal obligation to do so. I find that he did not, based upon the record that is before me.)

Since the investigator's determination has been appealed to the Chief Administrative Law Judge for a hearing *de novo* and it carries no weight before the Administrative Law Judge or the Administrative Review Board, the determination of the OSHA investigator is "inoperative" and does not bind the undersigned. In addition, a genuine issue of material fact exists concerning the issue of Complainant's cooperation in the investigation. Therefore,

IT IS ORDERED that Respondent City of Salem's motion for summary decision is denied.

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THOMAS F. PHALEN, JR.
Administrative Law Judge